

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JENNIFER BURKO,

Plaintiff,

vs.

Case No.

ANDREA LECROY, STEPHEN
LATHROP and ERIC SMITH, In their
official capacities,

Defendants.

Timothy Barkovic (P-29797)
Barkovic & Malkiewicz
Attorneys for Plaintiff
25805 Harper Avenue
St. Clair Shores, Michigan 48081
586/773-2120

COMPLAINT

NOW COMES, Plaintiff, Jennifer Burko, by and through her attorney Timothy Barkovic and brings this complaint against defendants. In support of the complaint, plaintiff, states the following:

1. Plaintiff, at all times relevant hereto has resided in the City of Saint Clair Shores, State of Michigan.

2. Defendant Andrea Lecroy, resides in the City of Saint Clair Shores, State of Michigan and on a date prior to the filing of the instant complaint, filed a criminal complaint against the plaintiff. The complaint(s) made by defendant, Lecroy gave rise to a criminal complaint being filed against the plaintiff for alleged violations of Michigan statute, which is the subject of this litigation. Defendant continues to aid, assist and maintain the prosecution of this plaintiff for plaintiff's exercising her rights under the First Amendment to the United States Constitution.

3. This action is brought against defendant Stephen Lathrop in his official capacity and an agent or employee of the City of Saint Clair Shores, State of Michigan, specifically a member of the City of the Saint Clair Shores Police Department. Defendant Lathrop has caused to be filed against this plaintiff a criminal complaint, exclusively and solely based on plaintiff's exercise of her constitutional rights to free expression. Defendant, Lathrop continues to aid and assist in the prosecution of the plaintiff and in doing so has and will deprive plaintiff of her rights under the First and Fourteenth Amendments to the United States Constitution.

4. This action is brought against defendant Eric Smith in his official capacity as the duly elected prosecuting attorney, in and for the County of Macomb, State of Michigan. Defendant Smith, through his agents and

employees have instituted and maintained criminal proceedings against this plaintiff, based solely on her expression of ideas, thoughts, beliefs, including speech, each of which is protected by the First and Fourteenth Amendments to the United States Constitution.

5. Jurisdiction is conferred on this court by 28 USC § 1331, this being a civil action arising under the Constitution and laws of the United States.

6. Jurisdiction is also conferred on this court by 28 USC § 1343(a)(3) and (4), 28 USC § 2201 and 2202 and 42 USC § 1983 and 1988, this being an action for injunctive and declaratory relief and further equitable relief authorized by law to redress deprivations under color of law of rights, privileges and immunities secured by the United States Constitution.

7. Venue is proper in this court because one or more of defendants reside within this district, or, in the alternative, all or a substantial portion of the acts and omissions giving rise to this cause of action occurred within this district. 28 U.S.C. § 1391(b).

8. At all time relevant to this action and in taking the various actions described in this complaint, defendants, have acted and threatened to act under color of law and were effecting and will effect, the custom, polices, laws and rules of the State of Michigan.

FACTS GIVING RISE TO PLAINTIFF'S CONSTITUTIONAL CLAIMS

9. On or about May 5, 2009, Plaintiff caused to be posted on the internet, on a website known as Craigslist, two messages.

10. Following the posting of the messages, defendant Lecroy made a report(s) to the City of Saint Clair Shores Police Department, seeking assistance.

11. The City of Saint Clair Shores Police Department conducted an investigation which revealed that this plaintiff posted the messages on the internet.

12. Following the investigation, defendant Lathrop petitioned defendant Eric Smith to initiate criminal charges against plaintiff, for the act of posting these messages on the internet.

13. On or about October 8, 2009, defendant Lathrop and Smith instituted criminal proceedings against this plaintiff pursuant to MCLA 750.411s.

14. MCLA 750.411s seeks to criminalize the posting of messages (speech) on the internet.

15. Presently the plaintiff is being prosecuted by defendants in the Macomb County Circuit Court, in the matter of the People of the State of Michigan vs. Jennifer Burko, case number 2009-4470-FH.

16. As a direct result of the enactment of MCLA 750.411s, plaintiff and others face the constant threat of criminal prosecution, for engaging in truthful, nonmisleading constitutionally protected expression(s).

COUNT 1

17. Plaintiff incorporates paragraphs 1-16 of the complaint herein.

18. MCLA 750.411s is unconstitutional on it's face and violative of the First and Fourteenth Amendments for the following reasons:

- (a) MCLA 750.411s is unconstitutional as it abridges the rights of freedom of speech and expression
- (b) MCLA 750.411s does not further any compelling governmental interest(s);
- (c) MCLA 750.411s is unconstitutionally vague and overbroad.

19. For these reasons, plaintiff is threatened with jail, fines, prosecution and incarceration and other threatened and irreparable harm for which plaintiff has no adequate remedy at law.

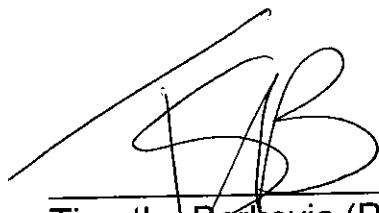
RELIEF REQUESTED

Accordingly, plaintiff is entitled to:

- (a) a declaration that MCLA 750.411s is unconstitutional on it's face;
- (b) a temporary and permanent restraining order and preliminary injunction precluding continued enforcement and prosecution under

MCLA 750.411s.

(c) any other relief authorized by law, including damages, costs and attorney fees for bringing this action.



Timothy Barkovic (P-29797)
Attorney for Plaintiff
25805 Harper Avenue
St. Clair Shores, Michigan 48081
586/773-2120

Dated: December 22, 2009

CIVIL COVER SHEET COUNTY IN WHICH THIS ACTION AROSE: Macomb

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for use of the Clerk of Court for the purpose of initiating the civil docket sheet.

I. (a) PLAINTIFFS

Jennifer Burko

DEFENDANTS

Andrea LeCroy, Stephen Lathrop, and Eric Smith, in their official capacities

(b) County of Residence of First Listed

Macomb

County of Residence of First Listed

Macomb

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(C) Attorney's (Firm Name, Address, and Telephone Number)

Timothy Barkovic (P-29797)

25805 Harper Avenue

St. Clair Shores, Michigan 48081

**11. BASIS OF JURISDICTION** (Place an "X" in One Box Only) 1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party) 2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item 111)**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State	<input checked="" type="checkbox"/> PLA	<input type="checkbox"/> DEF	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury-Med. Malpractice	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antifrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability		<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault Libel And Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability		<input type="checkbox"/> 450 Commerce/ICC
<input type="checkbox"/> 150 Recovery of Overpayment and Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability			<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	PERSONAL PROPERTY		<input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 850 Secu Rities/Com mod ilies/ Exchange
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 875 Customer Challenge 12 LISC 3410
<input type="checkbox"/> 180 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 385 Property Damage Product Liability		<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 195 Contract Product Liability				<input type="checkbox"/> 892 Economic Stabilization Act
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 861 HIA (1955f)	<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 520 Habeas Corpus: Accommodations	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 530 General	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 864 SSID Title XVI	<input checked="" type="checkbox"/> 950 Constitutionality of State Statutes
<input type="checkbox"/> 245 Tort Product Liability	<input checked="" type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 290 All Other Real Property		<input type="checkbox"/> 550 Civil Rights		
		<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	
			<input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY) 1 Original Proceeding 2 Removed from State Court 3

Remanded from Appellate Court

4 Reinstated or Reopened

5 (specify)

Transferred from another district

 6 Multi district Litigation

Appeal to District

 7 Judge from Magistrate**V1. CAUSE OF ACTION** (Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

42 USC, Section 1983, challenging as unconstitutional MCLA 750.411s

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

CHECK YES only if demanded in complaint: Yes No

VIII. RELATED CASE(S) instructions:

IF ANY

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

12/22/09

PURSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed?

Yes
 No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)

Yes
 No

If yes, give the following information:

Court: _____

Case No.: _____

Judge: _____

Notes :
